



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 6663-99
4 May 2000

LTCOL [REDACTED] USMCR
[REDACTED]
[REDACTED]

Dear Colonel [REDACTED]:

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 3 May 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by Headquarters Marine Corps (HQMC) dated 29 February and 16 March 2000, copies of which are attached, and your letter dated 27 April 2000 with enclosure. They also considered the portion of the precept of the Fiscal Year 2001 Marine Corps Reserve Colonel Active Reserve Selection Board relating to equal opportunity, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinions and the HQMC Research and Civil Law Branch opinion dated 16 April 1998 at attachment 13 of your application, a copy of which is attached. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:
5800
JAR3/18757
FEB 29 2000

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: REQUEST FOR ADVISORY OPINION ICO LIEUTENANT COLONEL
[REDACTED] CR

Ref: (a) LtCol [REDACTED] 1001 of 16 Apr 98

1. Issue. We were asked to comment on Lieutenant Colonel [REDACTED] petition to the Board for Correction of Naval Records (BCNR) for a special selection board (SSB) and removal of failures of selection from his official record.

2. Background and Analysis

a. Lieutenant Colonel [REDACTED] was considered and failed of selection by promotion selection boards for FY98 through FY00. In his BCNR petition, Lieutenant Colonel [REDACTED] states that he was not given fair and impartial consideration before the FY98 Active Reserve (AR) Colonel Promotion Selection Board (FY98 Promotion Board) due to the following errors: improper use of affirmative action language, improper creation of an AR competitive category, improper management of the AR officer program, improper PME guidance, and unlawful political influence. All allegations of error, with the exception of the unlawful political influence allegation, were included in reference (a), Lieutenant Colonel [REDACTED] original SSB request. Our response to this request is contained in attachment (13) of his BCNR petition, and we continue to advocate the opinions, legal analysis, and recommendations contained in that response. Below, we provide additional information regarding the allegation that the FY98 Promotion Board was subject to unlawful political influence.

b. In his BCNR petition, Lieutenant Colonel [REDACTED] alleges that the selection of four Marine officers by the FY98 Promotion Board was the result of unlawful political influence. Lieutenant Colonel [REDACTED] alleges that promotion board members were "apparently" aware of pressure being exerted by the Under Secretary of Defense for Reserve Affairs and the Commander, [REDACTED] Forces Reserve, to have two above-zone officers selected for promotion. He also alleges that two in-zone officers ultimately selected by the FY98 Promotion Board received unlawful preferential treatment: one because of an alleged favorable recommendation for promotion by the SecNav and the other because his immediate reporting senior was a board member.

Subj: REQUEST FOR ADVISORY OPINION ICO LIEUTENANT [REDACTED]
[REDACTED] USMCR

c. The only evidence Lieutenant Colonel [REDACTED] offers to support his allegation of unlawful political influence is in attachment (21) of his BCNR petition, a statement by Colonel [REDACTED] USMCR. In this statement, Colonel [REDACTED] stated: "There are always rumors associated with a promotion board, but there were several rumors concerning [this board] about political influence. Although, I confess no direct information, it was understood around the office that at least one, if not both, of the members chosen above zone was the beneficiary of this rumored political influence."

d. Lieutenant Colonel [REDACTED] has offered no evidence to support his allegation of unlawful political influence. His blanket allegations and the statement of Colonel [REDACTED] provide no evidence that board members acted improperly, or considered improper communications, when making their promotion recommendations. Although board proceedings are held in strictest confidence, members were advised in the precept of their duty to request relief from their non-disclosure obligation if they believed that the board's proceedings were affected by, inter alia, misconduct by a board member. Board members also took an oath to perform their duties **without prejudice or partiality** and were required not to discuss their own personal knowledge and evaluation of officers if such matters were not proper for inclusion in an officer's OMPF. There is no indication that board members violated this oath, discussed improper matters regarding Lieutenant Colonel [REDACTED] or other eligible officers, or reported any impropriety regarding the conduct of this selection board.

3. Conclusion

a. Lieutenant Colonel [REDACTED] petition for relief should be denied.

b. Our point of contact on this matter is [REDACTED]
at [REDACTED]

[REDACTED]
[REDACTED]
Colonel, U.S. Marine Corps
Deputy Staff Judge Advocate to the
Commandant of the Marine Corps
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
1000
RAP-22
16 MAR 2008

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS

Subj: BCNR APPLICATION IN THE CASE OF LIEUTENANT COLONEL [REDACTED]
[REDACTED] USMCR

1. We have reviewed the subject application and do not support special selection board (SSB) relief and removal of failures of selection from Lieutenant Colonel [REDACTED] official military record.

2. In the course of our review, Lieutenant Colonel [REDACTED] allegations of improper use of affirmative action language, improper creation of an Active Reserve (AR) competitive category, improper management of the AR officer program, and improper professional military education guidance were found to have been appropriately addressed in the Staff Judge Advocate (SJA) comment, application attachment (13), to his original SSB request. In support of his final allegation of unlawful political influence, no compelling evidentiary documentation has been submitted that would substantiate a claim of material error or injustice emanating from the allegation of unlawful political influence that would invalidate failures in selection for promotion and permit consequent consideration by a SSB.

3. We concur with the [REDACTED] advisory opinion that identifies the absence of evidence of selection board collusion or improper conduct or communication by the board members in violation of their oath.

4. Point of contact at this Division [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Colonel, U.S. Marine Corps Reserve
Branch Head, Reserve Affairs
Personnel Plans and Policy Branch,
Reserve Affairs Division
By direction

6663-99

FY-01

6. Equal Opportunity

★ { a. The Department of the Navy is dedicated to equality of treatment and opportunity for all personnel without regard to race, creed, color, gender, or national origin. The Marine Corps' goal is a professional working environment in which a Marine's race, creed, color, gender, or national origin will not impact his or her professional opportunities. Accordingly, within this board's charter to select those officers who are "best and fully qualified," you must ensure that officers are not disadvantaged because of their race, creed, color, gender, or national origin.

★ { b. Your evaluation of minority and women officers, as with all officers, must clearly afford them fair and equitable consideration. You should be particularly vigilant in your evaluation of these records to take care that no officer's promotion opportunity is disadvantaged by past attitudes or by service utilization policies or practices. You should evaluate each officer's potential to assume the responsibilities of the next higher grade, the overriding factor being performance of assigned duties, all of which are important.

★ { c. This guidance should not be interpreted as requiring or permitting preferential treatment of any officer or group of officers on the grounds of race, creed, color, gender, or national origin.

7. Continuation. An eligible officer who is recommended for continuation must be fully qualified for continuation, and his or her continuation must be in the best interest of the Marine Corps. "Fully qualified" means that the individual's record clearly demonstrates performance in a satisfactory manner considering the grade and technical specialty held.

8. The official military personnel records provided to the board may include medical documents relevant to an officer's physical qualifications. If the board desires clarification of any such document, then the board president should reduce the board's questions to writing and forward them to me. I will provide such clarification as may be appropriate.

9. The board president shall perform such administrative duties in connection with the board proceedings as I may prescribe. The board president has no authority to constrain the board from recommending for selection those fully qualified officers that the majority finds best qualified to meet the needs of the Marine Corps as specified by me. The board president shall ensure that paragraph 10 of this enclosure is read to each board member, recorder, and administrative support person on the convening date of the board or on the date of assignment to the board, whichever is later.

5800
JAR12/17235

AFR 1998

SJA TO CMC COMMENT on MMPR-1 r/s of 22 Apr 98

Subj: SPECIAL SELECTION BOARD REQUEST IN THE CASE OF LIEUTENANT COLONEL [REDACTED] USMCR

**Ref: (a) SECNAVINST 1401.1B, Special Selection Boards
(b) Title 10, United States Code**

Encl: (1) LtGen Christmas ltr 1900/RAP-22 of 4 Nov 94

1. **Issue.** You asked for our comment and recommendation on the request by Lieutenant Colonel [REDACTED], USMCR, an Active Reserve (AR) officer for a special selection board based on his several allegations of material error detailed below.

2. **Opinions**

a. Lieutenant Colonel [REDACTED] should not be granted a special selection board per reference (a).

b. The FY98 Reserve Colonel Selection Board precept created a competitive promotion category for AR officers that was in accordance with reference (b).

c. The balance of assertions regarding the alleged failure of the Secretary of the Navy (SecNav) to specifically consider AR funded billet requirements in formulating the precept, prohibited affirmative action precept mandates and the arbitrary results of the selection board have no merit.

3. **Analysis**

a. **Federal Law and SECNAVINST Requirements.** Section 14502 of reference (b) provides that the SecNav shall convene a special selection board if SecNav determines that the action of the board that considered the petitioning officer was contrary to law or involved material error of fact or material administrative error; or the board did not have material information before it for consideration. Under the applicable provisions of reference (a), the petitioning officer must show SecNav that he exercised reasonable diligence to discover and correct the mistake or omission. Material information is defined as that which, when properly recorded in the officer's official military personnel file (OMPF), would have been essential to a substantially accurate, complete, and fair portrayal of the officer's career. "Reasonable diligence" is not defined in reference (a), but a suitable definition is a fair, proper, and due degree of care and

Subj: SPECIAL SELECTION BOARD REQUEST IN THE CASE OF LIEUTENANT COLONEL [REDACTED] USMCR

activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity. Blacks Law Dictionary, 457 (6th ed. 1990).

b. Assertions of Error

(1) Allegation that the FY98 Selection Board Precept is Contrary to Law Because it Created a Separate Competitive Category for AR Officers. Lieutenant Colonel [REDACTED] claims that he should have been permitted to compete against Reserve officers at large instead of only against officers in the AR competitive category. Lieutenant Colonel [REDACTED] argues that the separate AR competitive promotion category could not exist until the effective date of SECNAVINST 1401.1C which replaced reference (a) on 4 May 1997, a date after the selection board met. This is incorrect.

Prior to the enactment of the Reserve Officer Personnel Management Act (ROPMA) and section 14005 of reference (b), section 5013 of reference (b) made SecNav responsible for, and authorized SecNav to conduct all affairs of the Department of the Navy. Included in this broad grant of authority is the responsibility to organize, supply, train, maintain, and administer the Navy. Creating competitive categories to ensure that the best qualified Marines are promoted is consistent with this grant of authority. Thus, SecNav's creation of a separate competitive category for AR officers on 4 November 1994, as reflected in enclosure (1), was in accordance with the statutory provisions of reference (b). Further, the separate category served the legitimate purpose of maintaining the AR community within statutory limits. Lieutenant Colonel [REDACTED]'s argument that the creation of this competitive category is contrary to law is without merit.

(2) Allegation that the Number of Authorized Selections Bore No Rational Relation to the Requirements of the AR program. Lieutenant Colonel [REDACTED] asserts, without factual basis, that the SecNav did not consider either the number of officers in each grade of the AR program or the funded billet requirements prior to authorizing the number of selections to the board. Section 14307 of reference (b) sets forth the four-prong criteria for this determination. There is no statutory requirement that compels SecNav to specifically consider either the number of officers in "each grade" of the AR program or AR "funded billet requirements" as urged by Lieutenant Colonel [REDACTED].

(3) Allegation that the FY98 Selection Board Precept Contains Improper Affirmative Action Mandates. Lieutenant Colonel [REDACTED] objects to language in the precept advising board

Subj: SPECIAL SELECTION BOARD REQUEST IN THE CASE OF LIEUTENANT COLONEL [REDACTED] USMCR

members of the possible adverse effects of past discrimination on the careers of women and minority officers being considered. The precept also advised that the Marine Corps goal is to attain a minority selection rate at a minimum equal to the overall selection rate. In support of his argument, Lieutenant Colonel [REDACTED] cites a U.S. Supreme Court decision on racial "set-asides" to argue that the goal language creates an unconstitutional racial classification that is not narrowly tailored to further a compelling government interest. The cited case has no applicability here. Far from being a "set-aside," the subject precept merely encouraged the selection boards to attain a selection rate for minority and women officers at a percentage equal to the overall selection rate. There is no requirement imposed that they do so. Moreover, a review of FY98 selection board indicates that the two African-Americans in zone were not selected for promotion and the one African-American who was above-zone was not selected.

(4) Allegation that the FY98 USMCR Colonel Selection Board Precept "Discounted" the Completion of Professional Military Education (PME) in Contravention of Prior CMC Guidance. This argument has no merit. There is no prohibition against SecNav instructing selection board members on the use of selection criteria in his precepts. Lieutenant Colonel [REDACTED] however, contends that because the precept states that completion of a Top Level School (TLS) is not "expected," the number of criteria for selection is reduced and his own competitiveness is decreased. This argument is without merit. The phrasing of the precept, stating that completion of TLS "is not expected" (instead of "not required" as suggested by Lieutenant Colonel [REDACTED]) is inconsequential. The precept recognizes that many reserve lieutenant colonels do not have an opportunity to attend a TLS. As such, these officers should not be penalized for non-completion of TLS. Moreover, section 14107(b)(5) of reference (b) provides that SecNav may provide such other information or guidelines as the Secretary concerned may determine to be necessary to enable the board to perform its functions. Information on the relevant importance of PME is appropriate other information or guidelines necessary for the respective promotion boards to select the best and most fully qualified for promotion, consistent with law.

4. Recommendation. We recommend that Lieutenant Colonel [REDACTED] not be granted a special selection board.

Drafted by: Maj Sweeney
614-2510


K. P. KELLY
By direction